

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to the Court of Appeals  
Appeal From Beaufort County  
Hon. Kristi Lea Harrington, Circuit Court Judge  
Appellate Case Tracking No. 2016-001306  
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RECEIVED  
JUN 08 2017  
S.C. SUPREME COURT

The State,

Respondent,

v.

Gerald Barrett,

Petitioner.

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Opinion No. 5395 (S.C. Ct. App. filed March 23, 2016)  
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**BRIEF OF RESPONDENT**  
\_\_\_\_\_

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## **STATEMENT OF ISSUES ON CERTIORARI**

- I. The Court of Appeals correctly affirmed the trial court's decision allowing the State's witness to testify as an expert and correctly found the testimony did not impermissibly bolster the child victim. Further, the issue as raised is not preserved for review.

## **STATEMENT OF THE CASE**

The State agrees with Petitioner's procedural Statement of the Case.

## ARGUMENT

- I. **The Court of Appeals correctly affirmed the trial court's decision allowing the State's witness to testify as an expert and correctly found the testimony did not impermissibly bolster the child victim. Further, the issue as raised is not preserved for review.**

The Court of Appeals correctly found the State's witness was qualified as an expert in "child sexual abuse characteristics and behavior" and that the qualification was not in contravention of this Court's decision in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). Further, the testimony did not violate the holding of State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). Additionally, the Court of Appeals should have found any issue raised regarding the substance of the testimony was not preserved for review on appeal. Finally, and most significantly, the issue raised in Petitioner's Brief is significantly different than the issue raised to the trial court.

### **Preservation**

Any issue related to the substance of the expert's testimony is not preserved for review on appeal. Prior to trial, Petitioner objected to the State's witness being qualified as an expert. The expert proffered testimony during which many discussions were had between counsel and the court regarding her testimony and its validity. However, this was pre-trial and the trial court reserved any final ruling. (T.138; R. 50). The trial court specifically limited the expert's testimony based on the discussions with counsel, and also indicated it would "depend on how she's qualified and what she says." (R.131). As a result, any testimony which counsel believed was inappropriate required an objection. Additionally, immediately before the expert's testimony, the trial court reminded counsel: "**But to protect your record, you need to object if there's anything objectionable.**" (T.233; R. 133) (emphasis added). This instruction clearly

articulated the trial court's belief that no rulings were final and her expectation that counsel would object to any testimony by the expert deemed inappropriate. When the State's expert did testify, Petitioner **never** raised a single objection to her testimony. (T.244-248; R. 144-148).

It was incumbent on Petitioner to raise an objection when the actual testimony was presented to the jury and to raise any specific issues related to that testimony he wished to preserve for review on appeal. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("In most cases, '[m]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.'"); State v. Kirton, 381 S.C. 7, 43, 671 S.E.2d 107, 125 (Ct. App. 2008) (same). As a result, no issue related to the expert's actual testimony is preserved for review on appeal.

Further, in his brief to the Court of Appeals, Petitioner challenged the testimony and qualification on the basis that it was a means of getting around this Court's decision in Kromah and was improper bolstering. Then, at oral argument he asserted the testimony impermissibly violates the decision in Anderson by allowing one person to testify as both forensic interviewer and expert in child abuse characteristics. This argument was not raised until the oral argument and petition for rehearing and should not be a basis for review.

Finally, before this Court he asserts not only should the trial court have required two individuals to testify instead of allowing the forensic interviewer to also testify as an expert, he now contends the testimony by the expert was "tailored" to the testimony of the victim and violates Anderson for that reason. The only issues raised to the trial court involved whether testimony would exceed that allowed by Kromah. Petitioner never raised an issue that the

testimony presented was “tailored” to fit the testimony of the victim.<sup>1</sup> Accordingly, this Court should find the issues raised on appeal are not preserved for review.

### **Merits**

On the merits, the trial court properly qualified the expert and correctly allowed her to testify regarding delayed disclosure and other behavioral characteristics of sex abuse victims. First, Petitioner seems to contend the trial court improperly qualified the State’s expert because she served as forensic interviewer. Petitioner also contends the Court erred in distinguishing State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015), and allowing the State to avoid the decision in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013).

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). A court’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004).

Qualification of a witness as an expert and the subsequent admission of that witness’s testimony are matters within the sound discretion of the trial court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when the trial court’s ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

While Kromah specifically found a person cannot be qualified as an expert in forensic interviewing, the case did not preclude a person from being qualified in another area solely because that person also acted as a forensic interviewer. See Kromah, 401 S.C. at 357 n.5, 737 S.E.2d at 499 n.5. The case dealt solely with testimony regarding the interview of a child abuse

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<sup>1</sup> As noted above, there is not a single objection to the substance of the testimony presented. As a result, any issue raised regarding the substance of the testimony being impermissible under Kromah, Anderson, or any other case is blatantly not preserved for review on appeal.

victim by a forensic interviewer. It did not involve any testimony regarding behavioral characteristics of victims of trauma such as sexual abuse, nor did it relate to any other testimony an expert may give on a subject outside of forensic interviewing.

Following Kromah, this Court issued its opinion in Anderson, finding the “**better practice**” was for the State to use someone other than the forensic interviewer as their expert witness to discuss delayed disclosure and other characteristics of child sexual abuse. Anderson, 413 S.C. at 218, 776 S.E.2d at 79 (emphasis added). The Court did this explaining: “To allow the person who examined the child to testify to the characteristics of victims **runs the risk** that the expert will vouch for the alleged victim’s credibility.” Id. at 218–19, 776 S.E.2d at 79 (emphasis added). Again, this Court did not bar the use of the same individual, but reiterated the requirements that the testimony of the expert cannot be used to impermissibly bolster or vouch for the victim.

The testimony in Anderson is vastly different from the testimony in the instant case. The testimony in the instant case does not impermissibly bolster or vouch for the victim. The testimony in the present case was a general discussion of universally accepted realities regarding delayed disclosure and the behavior of child abuse victims. The testimony was not “tailored” to the specific testimony of the child as it was in Anderson. In the instant case, the expert explained multiple reasons why a child would delay disclosure including:

threat of the perpetrator; they may not tell because of shame, feeling like it’s their fault, they blame themselves, they’re embarrassed; they may fear that they’re not going to be believed by telling; they may not feel like there’s ever an opportunity that’s a good time; they may fear that they tell, and it rips their family apart, or that this person that may have done — or this person that has done something to them may be really close to their family. It may be someone that they’re related to; it may be a caregiver; it may be a friend of the family.

(R.144). The victim testified she did not disclose because she didn't know what anyone would do and because she was scared about having to talk about it. (R.111-112). There was certainly not "tailoring" in the expert's broad description of reasons for delayed disclosure. Additionally, the expert explained the way a disclosure usually happens by stating:

And a lot of times kids disclose accidentally or purposefully. Accidentally usually is the little ones. They, by accident, tell, because they don't know not to tell. And, purposefully, usually teenagers tell purposefully when they either feel safe or they have a time when they're hanging out with their peers, which is — when you are a teenager, your peers are your world, and you start talking and you disclose on purpose.

(R.145). In this case, while the victim indicated she told several peers, the disclosure which ultimately lead to Petitioner being accused and brought to trial occurred through the victim's sister telling the victim's grandmother and not a peer telling someone. (R. 111-112). Again, this testimony was not tailored to the specific facts of this case as the testimony was in Anderson.

The Court of Appeals correctly found the trial court did not err in qualifying the State's witness as an expert, allowing her to testify—not as an expert—pursuant to the requirements of Kromah as a forensic interviewer, and in allowing her to testify as an expert regarding characteristics and behaviors of a child sexual abuse victim. The Court of Appeals properly distinguished this Court's holding in Anderson from the facts of this case.

Additionally, the testimony actually solicited from the expert in front of the jury was not improper testimony. Petitioner spends much of his brief discussing the expert's testimony regarding Child Sexual Abuse Accommodation Syndrome (CSAAS). Petitioner is using smoke and mirrors in a clear effort to misdirect the Court's attention, as this testimony **only** was offered during the **proffer** of the expert's testimony and was not at all offered by the State during the

expert's testimony before the jury. Ironically, the only time CSAAS is mentioned before the jury is when **Petitioner's** counsel raises it in recross-examination. (T.261; R.161). The only testimony presented to the jury involved general, non-tailored, behavioral characteristics of sexual abuse victims, including, *inter alia*, delayed disclosure and recollection of time.

This Court specifically upheld the practice of admitting behavioral testimony, including delayed disclosure testimony in Anderson. It stated: "Certainly we recognize that there is such an expertise: this is the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims." Anderson, 413 S.C. at 218, 776 S.E.2d at 79 (citing State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004) (such witness may be more crucial where alleged victim is a child)). Any issue taken with the substance of the expert's testimony, though clearly not preserved, is without merit in light of the limited testimony regarding the general behavioral characteristics of sexual abuse victims actually presented to the jury. Accordingly, the trial court did not err in allowing the testimony actually given at trial to be admitted before the jury.

The trial court properly qualified and allowed the testimony of the State's expert. While she served as the forensic interviewer, this did not *per se* preclude her from testifying as an expert, and she correctly heeded this Court's warning not to vouch for the child victim during her testimony. She presented general behavioral characteristics of sexual abuse victims to the jury in an effort to properly educate the jury regarding what can often be confusing or contradictory behaviors. See State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004) ("Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and impressionability of children often render them unable to effectively articulate

the events giving rise to criminal sexual behavior.”); State v. Weaverling, 337 S.C. 460, 475, 523 S.E.2d 787, 794 (Ct. App. 1999) (Behavioral characteristics of sexual abuse victims are “relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child’s often strange demeanor.”). Accordingly, this Court should affirm the trial court’s decisions and affirm Petitioner’s conviction and sentence.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion, the decisions of the trial court, and Petitioner's conviction and sentence should be affirmed.

Respectfully submitted,

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June 8, 2017

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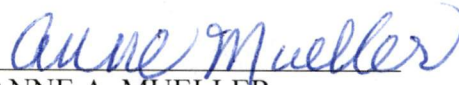
Petitioner.

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**PROOF OF SERVICE**  
\_\_\_\_\_

I, Anne Mueller, certify that I have served the within Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
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I further certify that all parties required by Rule to be served have been served.  
This 8<sup>th</sup> day of June, 2017.

  
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